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BRIEF AND APPENDIX FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED
AUG 20 1957
Joseph W. Stewart
CLERK

No. 13,881

JOSEPH S. CHINN,

Appellant

v.

IDA V. CHINN,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EVERETT L. EDMOND
1510 - 9th Street, N.W.
Washington, D.C.
Counsel for Appellant

STATEMENT OF QUESTIONS PRESENTED

The Court below erred as follows:

1. In awarding the appellee an absolute divorce on the ground of five years voluntary separation.

2. In decreeing a conveyance of appellant's joint interest in premises 209-44th Street, N. E., to appellee and their adopted daughter.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 13,881

JOSEPH S. CHINN,

Appellant

v.

IDA V. CHINN,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under Title 28, U.S.C., Section 1291, to review the rulings of the District Court below in this action begun by filing a complaint for absolute divorce. That court entered a final judgment, from which this appeal is taken. It had jurisdiction under Section 16-403 of the District of Columbia Code (1951 Ed.).

STATEMENT OF THE CASE

This is an appeal taken by appellant to reverse a judgment of the District Court entered on December 3, 1956, granting appellee an absolute divorce on the ground of five years voluntary separation. One previous attempt to obtain a limited divorce from the appellant on the ground of cruelty was dismissed by the District Court after a full hearing in Civil Action No. 251-53, by final judgment of the court below entered April 15, 1954.

In the complaint for limited divorce the appellee alleged in paragraph four thereof as follows:

> "Plaintiff and defendant lived and cohabited together as husband and wife until January 15, 1951, when they separated by reason of cruel and abusive treatment exhibited by the defendant (appellant) upon the plaintiff (appellee), consisting largely of arguments, accusations without justification, causing plaintiff (appellee) to be nervous, the conduct of the defendant (appellant) has destroyed the marital relationship herein and plaintiff (appellee) alleges that she can no longer live and cohabit with defendant (appellant) without prejudice to her health." (R. 1) (Appellant's App. 1)

Appellant's answer to the foregoing paragraph four of the complaint for limited divorce was a denial of the allegations and the affirmative allegation by appellant of cohabitation between the parties subsequent to the filing of the said complaint for limited divorce. In its dismissal of the complaint for limited divorce the lower court decreed that the 'he appellant had not treated the appellee cruelly, and that the appel'ant had supported the appellee and their adopted child to the best of his ability. The lower court then concluded that the appellee was not entitled to any relief. The final judgment, therefore, in Civil Action No. 251-53, was in favor of the appellant which included the issue of cohabitation and cruelty as of April 15, 1954.

Likewise in paragraph four of appellee's complaint for absolute divorce on the ground of 5 years voluntary separation, which is the subject of this appeal, the appellee alleged as follows:

> "That while the plaintiff (appellee) and defendant (appellant) have been living in the same house they have not cohabited together for more than five years. The defendant (appellant) has been so cruel and abusive to plaintiff (appellee), and has so harassed and embarrassed her until, that since January 15, 1951, she has had no marital relations with him, that since said date they have lived completely separate and apart notwithstanding at the same address."

That appellant owned premises 209 - 44th Street, N. E., and 25 - 45th Street, N. E., and he took title to said properties in the name of appellee and himself as tenants by the entirety.

That the order of the lower court dated December 3, 1956 (R. 11) (Appellant's App. 9), in addition to awarding appellee an absolute divorce on the ground of 5 years voluntary separation, also awarded premises 209 - 44th Street, N. E., to appellee and Carol Chinn, as joint tenants, and awarded premises 25 - 45th Street, N. E., to appellant. Appellee was also awarded custody of their adopted child and $15.00 per month for the support of said minor. It is because of the grievances growing out of the foregoing that appellant prosecutes this appeal.

STATUTE INVOLVED

Title 16, Section 403, District of Columbia Code, 1951 Edition, which provides:

> "A divorce from the bond of marriage . . . may be granted for . . . voluntary separation from bed and board for five consecutive years without cohabitation . . . ."

SUMMARY OF ARGUMENT

1. This court has consistently held that a separation between spouses must be agreed upon as to both parties before it can be deemed voluntary within the meaning of the statute in question. If such agreement be absent initially as to one party, it is the duty of the party who is contending that a change has occurred in the character of the separation - e.g., from involuntary to voluntary - has the burden of proving that contention, and if she offers no evidence of a change of mind in the unwilling party, the law presumes that there was no change.

Since the final judgment entered by Judge Letts in the court below on April 15th, 1954, conclusively shows that appellant did not treat appellee cruelly, and since appellee did not allege in Civil Action No. 251-53, that the separation was voluntary, then it follows as a legal consequence that appellee's separation was one of desertion, which is wholly irreconcilable with voluntary separation.

2. The court erroneously disposed of the joint real estate owned by the parties: The parties owned two pieces of real estate, one of the value of $18,000.00, while the other was of the value of $6,500.00. The lower court awarded the property valued at $18,000.00 and unencumbered to appellee and the minor child jointly, and awarded the $6,500.00 real estate encumbered to the extent of $1,000.00, to the appellant. Appellant takes the position that there is nothing in the record which justifies such distribution of their real estate and consequently the lower court was without jurisdiction to make such a disposition.

ARGUMENT

I.

MAY CRUELTY AND VOLUNTARY SEPARATION CO-EXIST AS GROUNDS FOR DIVORCE?

Appellant conceives the issue to be: Whether a wife who has grounded her suit for limited divorce on the issue of cruelty and having alleged in that suit that her separation from the husband is due to cruelty, and whose suit was dismissed by the trial court, may in her suit for absolute divorce on the ground of 5 years voluntary, use January 15, 1951, as the commencement date common to both suits.

To state the question tersely, can cruelty be made the basis of 5 years voluntary separation?

An analysis of the decisions of this court reveals the following principles of law relating to "voluntariness" within the meaning of Title 16, Section 403 of the D.C. Code: Before a divorce is authorized under the statute, the separation must have been voluntary on the part of both husband and wife or acquiesced in by them. In Dorsey v. Dorsey, 94 F. Supp. 917, affirmed 90 U.S. App. D.C. 284, 195 F.2d 567, the court said that the statute authorizing divorce for voluntary separation for 5 consecutive years requires a physical separation plus a mental disposition which gives a voluntary character of separation. This court has expressed itself on many phases of this question in the following cases:

Roberts v. Roberts, 95 U.S. App. D.C. 382, 222 F.2d 408, (1955);
Uline v. Uline, 92 U.S. App. D.C. 281, 205 F.2d 870 (1953);
Hawkins v. Hawkins, 89 U.S. App. D.C. 147, 191 F.2d 334 (1951);
Coci v. Coci, 88 U.S. App. D.C. 43, 188 F.2d 898 (1950);
Martin v. Martin, 82 U.S. App. D.C. 40, 160 F.2d 20 (1947);
Bufford v. Bufford, 81 U.S. App. D.C. 169, 156 F.2d 567 (1946);

Butler v. Butler, 81 U.S. App. D.C. 26, 154 F.2d 203 (1946); Boyce v. Boyce, 80 U.S. App. D.C. 355, 153 F.2d 229 (1946); Bowers v. Bowers, 79 U.S. App. D.C. 146, 143 F.2d 158 (1944); Parks v. Parks, 73 U.S. App. D.C. 93, 116 F.2d 556 (1940).

The word voluntary connotes agreement, i.e., both parties must have agreed to live apart. Martin v. Martin, supra. It is not sufficient that the separation is voluntary in the beginning, it must be voluntary for the entire statutory period. Bowers v. Bowers, supra. Though initially voluntary, divorce is not authorized if the separation thereafter ceases to be voluntary within the five-year period. See Martin v. Martin, supra; Bowers v. Bowers, supra. On the other hand even though the separation is involuntary in its inception, divorce is authorized if it thereafter becomes voluntary and continues so for the statutory period. Boyce v. Boyce, supra; Parks v. Parks, supra. Though one party does not agree to the separation in the beginning, that separation will become voluntary as to him also if he thereafter silently acquiesces.

The acquiescence constitutes agreement and the court will award the divorce. Bufford v. Bufford, supra; Boyce v. Boyce, supra; Bowers v. Bowers, supra; Parks v. Parks, supra. Where one party originally is agreeable so that the separation is initially voluntary as to him, but he later changes his mind and makes an attempt to reconcile within the statutory period, the separation then becomes involuntary and divorce is precluded. Cf. Martin v. Martin, supra; Boyce v. Boyce, supra; Bowers v. Bowers, supra. Conversely, a divorce may not be granted where one party does not initially agree to separate and, after the separation, makes efforts to bring about a reconciliation. Martin v. Martin, supra. In the instant appeal the appellee alleged in her complaint for limited divorce, C.A. No. 251-53, that she separated herself from the appellant and withheld cohabitation from him because of his cruelty. She alleges that January 15, 1951, was the date of her separation. On April 15, 1954, Judge Letts found as a fact and included said findings in

his final judgment, that the appellant had not treated the appellee cruelly and that appellant had supported appellee and their adopted daughter to the best of his ability. The judgment therefore is res judicata on the issues of cruelty and non-support as of April 15, 1954. The further effect of this judgment entered by Judge Letts is that the separation of the appellee was not due to cruelty, that it was not due to voluntary separation, but was due to the desertion of the appellee. If the appellee drove the appellant from his cohabitation with her for a cause that the judgment of the lower court determined did not exist, then the appellee is a constructive deserter. Under such circumstances the voluntary separation did not and could not arise. It was therefore incumbent upon the appellee to have shown in Civil Action No. 804-56, when and how her claim of voluntary separation arose, especially in the light of Judge Letts' entry of judgment under date of April 15, 1954. Once it is established that the separation was originally unilateral, the law presumes that it continues to be of that nature (Bufford v. Bufford, supra); and the party who contends that its character thereafter changed has the burden of proving the change. Bowers v. Bowers, supra.

In the case of Pratt v. Pratt, 99 U.S. App. D.C. 401, 240 F. 2d 639 (1957), this court held, that desertion and voluntary separation cannot exist at the same time. When tested in the light of the above principles of law enunciated by this court the conclusion seems inescapable that the separation in this case has at no time been voluntary on the part of the appellant and that the evidence on the part of the appellee was insufficient in law to entitle her to a divorce. That this is especially true where appellee makes cruelty the motivating cause of her separation in both Civil Actions Nos. 251-53 and 804-56. Under the foregoing circumstances the appellee having taken the position in Civil Action No. 251-53, that the separation was caused by cruelty, a ground normally supporting or justifying desertion, she is estopped by the record on this appeal from saying, in a subsequent suit covering the same period initially, that the separation was due to voluntariness on the part of both spouses.

II.

THE DISTRICT COURT IS WITHOUT POWER TO AWARD HUSBAND'S JOINT INTEREST IN REAL PROPERTY TO HIS ADOPTED DAUGHTER

Historically, of course, divorce and its problems, like marriage, was a function of the church. With the common law, our law of divorce inherited from the ecclesiastical courts of England to which an absolute divorce was unknown. Alexander v. Alexander, 13 U.S. App. D.C. 344, 345 (1898). Under the ecclesiastical law, a divorce from bed and board carried with it the power to award alimony but only on the basis of a continuing obligation of the husband to the wife accruing with the passage of time. Emerson v. Emerson, 120 Md. 584, 87 A. 1033 (1913). By statute the ecclesiastical concept of divorce has now been universally enlarged in the Anglo-Saxon world. Additional to what we now commonly refer to as a limited divorce or legal separation - that inherited from ecclesiastical law - there now exists the absolute divorce which, being a creature of statute, is subject to its terms, grants and limitations. Alexander v. Alexander, supra; Holmes v. Holmes, 81 U.S. App. D.C. 132, 133, 156 F. 2d 737 (1946).

In expanding the ecclesiastical concept of divorce and engrafting their own provisions for support and settlement of property interest, the States adopted a wide variety of patterns. In general however, it is important to note that some - like the Congress in legislating for the District of Columbia - continued in the ecclesiastical tradition that alimony as such as distinguished from severance of property interest, was a continuing obligation of support accruing with the evolution of time, while other States losing sight of the origin and theory of alimony, or misusing the term, intergrated support and division of property provisions. Only in the latter jurisdiction of which the District of Columbia is not one - is real property of a spouse awarded to compensate for alimony augmentation.

In Bishop on marriage and divorce, Volume 2, Section 835, P. 339, it is stated:

> "The court cannot decree to the wife, as alimony, gross sum, an absolute title in specific property or a sale of a part of the husband's estate for her use."

It is significantly noted that the lower court gave to appellee and the adopted daughter, premises 209 - 44th Street, N. E. as joint tenants, and awarded appellant premises 25 - 45th Street, N. E. The former real property is of the value of $18,000.00, while the latter real property is valued at $6,500.00 inclusive of $1,000.00 encumberance. It is apparent that the aggregate value of the joint real estate owned by the parties was $23,500.00 and the equitable distribution thereof required a moiety of $11,750.00 each or its equivalent. Notwithstanding the equitable requirements the lower court's award resulted in the appellee and the adopted child receiving the $18,000.00 home and the appellant the $6,500.00 home subject to an encumberance of $1,000.00.

The adopted child is merely a prospective heir of the appellant with no interest whatever in appellant's property and the lower court was without jurisdiction to decree such a conveyance. Wheeler v. Wheeler, 88 U.S. App. D.C. 193, 188 F.2d 31 (1951); Keleher v. Keleher, 89 U.S. App. D.C. 266, 192 F.2d 601 (1952), cert. denied 343 U.S. 943; Cf. Slaughter v. Slaughter, 83 U.S. App. D.C. 301, 171 F.2d 129; Oxley v. Oxley, 159 F.2d 10, 81 U.S. App. D.C. 346 (1947).

Since this court has held that the husband's real estate may not be conveyed to the wife in furtherance of alimony security, it therefore follows as a matter of law that the father's real estate may not be appropriated in augmentation of his adopted daughter's maintenance.

CONCLUSION

That by reason of the force of the decisions cited above together with the admitted facts in the instant case, the appellant respectfully urges this court to reverse and remand this cause.

Respectfully submitted,

EVERETT L. EDMOND

1510 - 9th Street, N.W.
Washington, D.C.

Counsel for Appellant

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APPENDIX FOR APPELLANT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

1 [Filed Jan. 19, 1953]

IDA V. CHINN
209 - 44th Street, N. E.
Washington, D. C.

Plaintiff,

-vs-

JOSEPH S. CHINN
209 - 44th Street, N. E.
Washington, D. C.

Defendant.

Civil Action No. 251-53

COMPLAINT FOR LEGAL SEPARATION AND DIVISION OF PROPERTY RIGHTS

1. Plaintiff, IDA V. CHINN, an adult citizen of the United States, and resident of the District of Columbia, for more than two years next preceding the filing of this complaint, sues the defendant, JOSEPH S. CHINN, also an adult citizen of the United States, and resident of the District of Columbia in his own right, for relief as provided in Title 16, Sections 403, 410 and 415 of the Code of Laws for the District of Columbia.

2. Plaintiff and defendant were lawfully intermarried August 30, 1940, at Marlboro, Maryland; that there is one child of this marriage, CAROL CHINN, age 6 years.

3. During the married life of plaintiff and defendant, your plaintiff has done everything in her power for the comfort and welfare of defendant, his home and family, but notwithstanding said disposition of plaintiff as aforesaid, defendant committed the grievances hereinafter related.

4. Plaintiff and defendant lived and cohabited together as husband and wife until on or about January 15, 1951, when they separated by reason of cruel and abusive treatment exhibited by defendant upon the plaintiff,

consisting largely of arguments, accusations without justification, causing plaintiff to be nervous; the conduct of defendant has destroyed the marital relationship herein and plaintiff avers she can no longer live and cohabit with defendant without prejudice to her health.

5. There are property rights to be adjudicated in premises 209 - 44th Street, N.E. and 25 - 45th Street, N.E., both in the District of Columbia, and property located at Greenway Beach, Maryland; also in furniture and a Packard automobile, 1949 model.

WHEREFORE, the premises considered, plaintiff prays:

1. That process issue herein against defendant.

2. That plaintiff be awarded custody of the minor child, with an allowance for her support and that of the minor child pendente lite and permanently.

3. That plaintiff be awarded a judgment of limited divorce.

4. That plaintiff be awarded an allowance of counsel fees and costs.

5. For such other and further relief in the premises as to the Court shall be deemed meet and proper.

/s/ JOHN J. O'BRIEN
Attorney for Plaintiff

/s/ IDA V. CHINN
Plaintiff

* * *

DISTRICT OF COLUMBIA, SS:

IDA V. CHINN, being first duly sworn on oath deposes and says that she is the person named as plaintiff above; that she has read the foregoing complaint by her subscribed, and that she knows the contents thereof; that the matters and things therein related are true to the best of her knowledge and belief.

/s/ IDA V. CHINN

Subscribed and sworn to before me this 16th day of January, 1953.

/s/ (Illegible)
Notary Public, D.C.

3 [Filed Feb. 20, 1953]

ANSWER

First Defense

The Complaint fails to set forth a claim upon which relief may be granted.

Second Defense

1. Defendant admits the allegations of paragraph 1 of the Complaint except that he denies that the plaintiff is entitled to any relief under the quoted sections, or under any provisions of law.

2. Defendant admits the allegations of paragraph 2 of the Complaint except that he states that the child Carol Chinn is the adoptive daughter of the parties.

3. Defendant denies the allegations of paragraph 3 of the Complaint.

4. Defendant denies the allegations of paragraph 4 of the Complaint, and in further answer to said paragraph alleges that since their marriage as aforesaid to and including the date of the filing of the said Complaint plaintiff and defendant have lived and co-habited together in the District of Columbia.

5. Defendant denies the allegations of paragraph 5 of the Complaint.

Third Defense

The plaintiff is not a fit person to have custody of a minor child, and has, in addition, beaten and mistreated said child.

4

Fourth Defense

The defendant is at the present time supporting the plaintiff and said minor child, an adoptive child of the plaintiff and defendant.

Fifth Defense

Plaintiff is employed in the Medical Library at Howard University at a Salary of $2,750.00.

Sixth Defense

That any disagreements or unpleasantness which may have arisen between the plaintiff and defendant during their married life were caused by the actions of the plaintiff in failing to fulfill her obligations as the

wife of the defendant and, defendant is informed and believes, in consorting with one Dr. Mansfield of Howard University, now recently deceased.

Seventh Defense

Upon information and belief, defendant alleges that plaintiff is of unsound mind.

WHEREFORE, defendant prays that this Honorable Court will dismiss the plaintiff's action with prejudice, and will grant to the defendant such other and further relief as to the Court appears just and proper.

/s/ Jo V. Morgan, Jr.

* * *

Attorney for Defendant

(Certification of Service)

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5 [Filed April 15, 1954]

FINAL JUDGMENT

This cause having come on for final hearing, and the plaintiff having presented her evidence, and the defendant thereafter having moved pursuant to Federal Rule of Civil Procedure 41(b) for a dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief, and the Court finding that plaintiff and defendant were married August 30, 1940 in the State of Maryland and have an adopted minor child, Carol Chinn, and finding that the defendant has not treated the plaintiff cruelly, and has supported the plaintiff and the said minor child to the best of his ability, and the Court finding that the interest of the said minor child is best served if neither the plaintiff nor the defendant is granted exclusive custody, and the Court concluded as a matter of law that the plaintiff is not entitled to any relief, it is by the Court this 15th day of April, 1954,

ORDERED, ADJUDGED AND DECREED that final judgment be, and the same is hereby, granted in favor of the defendant and against the plaintiff dismissing the above entitled action with prejudice.

/s/ F. DICKINSON LETTS
Judge

(Certification of Service)

---

6 [Filed Feb. 23, 1956]

IDA CHINN
209 44th Street, N. E.
Washington, D.C.
Plaintiff

vs

JOSEPH S. CHINN
209 44th Street, N. E.
Washington, D.C.
Defendant

Civil Action No. 804-56

COMPLAINT FOR ABSOLUTE DIVORCE
(FIVE YEARS VOLUNTARY SEPARATION)

The plaintiff, Ida Chinn, represents to this Honorable Court as follows:

1. That she is a citizen of the United States and a resident of the District of Columbia and has been for more than two years next preceding the filing of this complaint.

2. That the defendant is a citizen of the United States and a resident of the District of Columbia and has been for more than two years next preceding the filing of this suit.

3. That the parties hereto were lawfully married August 30, 1940, in Upper Marlboro, Maryland; that the parties have one child, who is in the custody of the plaintiff.

4. That while the plaintiff and defendant have been living in the same house they have not cohabited together for more than five years;

the defendant has been so cruel and abusive to plaintiff and has so harassed and embarrassed her that since January 15, 1951 she has had no marital relations with him; that since said date they have lived completely separate and apart notwithstanding residence at the same address.

5. That the plaintiff and defendant jointly own property located at 25 45th Street, N. E.; valued at the approximate market value of $6,500 and property at 209 44th Street, N. E., valued at approximately $15,000.

6. That there is no collusion or connivance on the part of either party for the purpose of this action, nor is there any hope of reconciliation.

7 WHEREFORE, plaintiff demands:

1. Judgment against the defendant for divorce from the bonds of matrimony upon the ground of voluntary separation for over five years at the final hearing of this cause.

2. The plaintiff be given custody of the minor child of the parties.

3. That she be given an adequate amount of support for herself and said child, court costs and attorney fees.

4. That she be given her share of the jointly-owned property.

5. For such other and further relief as the nature of the case may require and to this Court may seem just and proper.

/s/ IDA V. CHINN

DISTRICT OF COLUMBIA, SS:

Ida Chinn, being first duly sworn on oath according to law deposes and says that she has read the foregoing complaint by her subscribed and knows the contents thereof; that the matters of fact therein are true and those matters stated upon information and belief she believes to be true.

/s/ IDA V. CHINN

Subscribed and sworn to before me this 27th day of January, 1956.

/s/ (Illegible)

Notary Public, D. C.

/s/ Belford V. Lawson, Jr., Atty. for Pltf.

8 [Filed Mar. 16, 1956]

ANSWER

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

1. Paragraph one of complaint is admitted.

2. Paragraph two of complaint is admitted.

3. Defendant admits the marriage as alleged, admits they have an adoptive child Carol Chinn and states that said child is in the care and control of both plaintiff and defendant, this Court having refused to grant exclusive custody of said child to plaintiff in the final decree in Civil Action No. 251-53, and denies the remaining allegations of paragraph three of the complaint.

4. Paragraph four of the complaint is denied.

5. Paragraph five of the complaint is admitted except that plaintiff does not have sufficient information to form a belief as to the allegations of market value.

6. Defendant admits there is no collusion or connivance, and denies the balance of paragraph six of the complaint.

Third Defense

1. On or about January 19, 1953, in the United States District Court for the District of Columbia, plaintiff in an action denominated Civil Action No. 251-53 filed a complaint for legal separation and property rights in which she sought a limited divorce and other relief.

9 2. In said action defendant was duly served with process and filed an answer.

3. In said complaint plaintiff alleged, and by said answer defendant denied separation on or about January 15, 1951, by reason of cruel and abusive treatment of plaintiff by defendant.

4. Said Civil Action came on for final trial before the Honorable F. Dickinson Letts, a Judge of this Honorable Court, both parties being present and the Court entered by a final judgment dated April 15, 1954,

finding, among others, that the defendant had not treated the plaintiff cruelly, and had supported the plaintiff and minor child to the best of his ability, and concluded as a matter of law that plaintiff was not entitled to any relief, thereupon entering final judgment in favor of defendant and against plaintiff dismissing said Civil Action No. 251-53 with prejudice.

Fourth Defense

The plaintiff is not a fit person to have custody of a minor child, and has beaten and mistreated said child.

/s/ JOSEPH S. CHINN
Defendant

/s/ Jo V. Morgan, Jr.

* * *

Attorney for Defendant

VERIFICATION

DISTRICT OF COLUMBIA, ss:

JOSEPH S. CHINN, first being duly sworn, on his oath says that he has read the foregoing answer by him subscribed and that the matters and facts therein stated are true to the best of his information, knowledge and belief.

/s/ JOSEPH S. CHINN

Subscribed and sworn to before me this 13th day of March, 1956.

/s/ Vera Simpson
Notary Public, D.C.

(Certification of Service)

11 [Filed Dec. 3, 1956]

JUDGMENT FOR ABSOLUTE DIVORCE

This cause coming on to be heard, upon the complaint and answer, the testimony taken in open Court, argument of counsel, and it appearing to the Court from consideration thereof that the plaintiff is a citizen of the United States and has been a resident of the District of Columbia for more than two years next preceding the filing of this action; that the plaintiff and defendant were married on August 30, 1940, in Upper Marlboro, Maryland; that the parties have one child, who is in the joint custody of the plaintiff and defendant; that the plaintiff and defendant voluntarily separated on January 15, 1951; said separation has been continuous without cohabitation to this day, it is by the Court this 3rd day of December, 1956,

ORDERED, ADJUDGED AND DECREED, that the plaintiff be and she is hereby granted an absolute divorce from the defendant on the ground of five years voluntary separation, continuously, and uninterrupted without cohabitation to the present date; provided that this judgment shall not become effective until the expiration of the time allowed for taking an appeal, nor until a final disposition of any such appeal, nor in any event until the expiration of six months from the date hereof.

12 It is further ORDERED, ADJUDGED AND DECREED, that the custody of the minor child of the parties hereto be awarded to the plaintiff and that the defendant pay to the plaintiff the sum of $15.00 a month for support of said child; said payments to be made on the first of each month beginning January 1, 1957; that the defendant is hereby given the right of visitation at reasonable times.

It is further ORDERED, ADJUDGED AND DECREED, that the property owned by the parties hereto, as tenants by the entireties, located at 209 44th Street, Northeast is hereby awarded and conveyed to the plaintiff and Carol Chinn, the minor child of the parties hereto as joint tenants and that the property owned by the parties as tenants by the entireties, located at 25 45th Street, Northeast, be and is

hereby awarded and conveyed to the defendant in fee simple. Plaintiff may not convey her interest in said property for six years without leave of Court.

/s/ Edward M. Curran
Judge

Seen:
/s/ Jo V. Morgan, Jr.
Attorney for Defendant.

---

13 [Filed Dec. 12, 1956]

MOTION FOR JUDGMENT N.O.V., OR IN THE ALTERNATIVE FOR A NEW TRIAL

Comes now the defendant, by his attorney of record, and moves the Court for a Judgment N.O.V., or in the alternative, a new trial, and as reasons therefor, states as follows:

1. That there was no competent evidence before the court upon which a finding on the ground of 5 years Voluntary Separation could be predicated.

2. That the judgment of this court in Civil Action No. 251-53, dated April 15th, 1954, precludes the issue of 5 years Voluntary Separation accruing prior thereto.

3. That the court was without jurisdiction to award defendant's real property to the plaintiff, where in the plaintiff furnishes no part of the consideration for its purchase.

4. That the court erred in awarding custody of the minor child to plaintiff.

5. That the complaint failed to allege any facts upon which the relief granted, can be supported.

6. That the substance of the relief sought and denied in Civil Action No. 251-53, is the same as the relief sought and granted in

the above-entitled cause.

7. That the relief granted by the entry of judgment herein was barred by the doctrine of res judicata.

14 8. That the judgment herein is vague and ambiguous.

9. And other sufficient reasons apparent upon the record of this court.

/s/ JAMES A. WASHINGTON, JR.

* * *

Attorney for the Defendant

(Certification of Service)

---

18 [Filed March 15, 1957]

ORDER

The above cause coming on for hearing on January 11, 1957, and upon submission without argument by counsel of both parties and consideration by the Court it is this 15th day of March, 1957,

ORDERED, ADJUDGED AND DECREED, that the defendant's Motion for Judgment N.O.V. or in the alternative for a new trial be and the same is hereby denied.

/s/ EDWARD M. CURRAN

Judge

(Certificate of Service)

---

19 [Filed March 22, 1957]

NOTICE OF APPEAL

Notice is hereby given this 22nd day of March, 1957, that the defendant, Joseph S. Chinn hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15th day of March, 1957, in favor of plaintiff, Ida Chinn against said defendant, Joseph S. Chinn.

/s/ Everett L. Edmond
Attorney for defendant

Mail to Belford V. Lawson, Jr., Esq.
2001 - 11th St., N.W., Washington, D.C.

---

20 [Filed April 26, 1957]

APPELLEE'S (PLAINTIFF'S) DESIGNATION OF RECORD

The Clerk of the United States District Court for the District of Columbia will please prepare for the record on appeal to the United States Court of Appeals for the District of Columbia in the above entitled cause the following:

1. Transcript of all testimony of all witnesses.
2. This designation of record.

/s/ Belford V. Lawson, Jr.
Attorney for Plaintiff

* * *

(Certificate of Service)

---

21 [Filed April 27, 1957]

APPELLANT'S (DEFENDANT'S) DESIGNATION OF RECORD

The clerk of the United States District Court for the District of Columbia will please prepare on record on appeal to the United States Court of Appeals for the District of Columbia Circuit in the above entitled cause, and the following papers and proceedings, are hereby indicated for inclusion in said record on Appeal.

1. The complaint for absolute divorce.
2. The answer.
3. The complaint for limited divorce in civil action 251-53.
4. The answer filed in civil action 251-53.
5. The final judgment in civil action No. 251-53 dated April 14, 1954.
6. Final judgment granting absolute divorce in C.A. No. 804-56.
7. Motion for judgment N.O.V. or in alternative for new trial filed C.A. No. 804-56.
8. Order denying motion for judgment N.O.V. or in alternative for new trial, entered in C.A. No. 804-56.
9. Transcript of testimony of Ida V. Chinn and Joseph S. Chinn.
10. Notice of Appeal.
11. Appeal bond.
12. This designation of record.

/s/ Everett L. Edmond
Attorney for Defendant

(Certificate of Service)

Office - Supreme Court, U.S.
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BRIEF FOR APPELLEE AND SUPPLEMENTAL APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 12 1957
Joseph W. Stewart
CLERK

No. 13,881

JOSEPH S. CHINN,

Appellant,

v.

IDA V. CHINN,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BELFORD V. LAWSON, Jr.
MARJORIE A. McKENZIE
2001 11th Street, N. W.
Washington, D. C.
Attorneys for Appellee

QUESTIONS PRESENTED

Whether Appellee's earlier, unsuccessful suit for a limited divorce on the ground of cruelty is a bar to her subsequent suit for absolute divorce on the ground of five years voluntary separation, where, as here, the suits have a common separation date.

Whether the trial court erred in incorporating into the final decree of divorce a property agreement approved by the parties and their counsel, where such agreement provides for an interest to be conveyed to the minor child of the parties and provides further for only nominal support.

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 13,881

JOSEPH S. CHINN,

Appellant,

v.

IDA V. CHINN,

Appellee.

APPEAL FROMTHE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF THE CASE

Appellant seeks to reverse the judgment of the Court below, dated December 3, 1956, granting Appellee an absolute divorce on the ground of five years voluntary separation. On April 15, 1954, the United States District Court for the District of Columbia dismissed Appellee's suit against Appellant for a limited divorce on the ground of cruelty, which suit alleged that the parties had separated on January 15, 1951. On February 23, 1956, the Appellee filed a suit for absolute divorce on the ground of five years voluntary separation,

alleging the same date of separation, January 15, 1951. The Court below granted Appellee a judgment for absolute divorce and upon the consent and agreement of both parties and their counsel apportioned two parcels of real estate owned by Appellant and Appellee as tenants by the entireties. This agreement awarded one house to the Appellant as his sole property and the other to the Appellee and the minor child of the parties as joint tenants, with the proviso that Appellee may not convey her interest in the property without leave of Court. Appellee received no alimony award, but Appellant was ordered to pay $15.00 maintenance per month for the support of the child.

SUMMARY OF ARGUMENT

1. Appellee's earlier suit for divorce on the ground of cruelty is not a bar to her later suit on the ground of five years voluntary separation, even though the separation date used in both suits is the same. The question to be considered is not the origin of the separation, but its continuing character. Where, as here, the spouse who opposes the divorce action, testifies again and again that he never asked for reconciliation, but only secretly wished for it, his conduct amounts to voluntariness under our statute. The fact that the parties lived under the same roof will not preclude the divorce, since there is ample evidence, by the parties and their witnesses, that they lived wholly separate lives.

2. The Court has jurisdiction under Title 16, Section 409, District of Columbia Code, 1951 Edition, to award or apportion the real property held by the parties as tenants by the entirety. The statute by its terms recognizes the validity of postnuptial property agreements.

The trial Court might have ordered premises 209 44th Street, N.E. conveyed to the wife on the basis of the evidence before it relating to her contributions to its purchase. Such power has been augmented

by the agreement of tthe parties and their counsel to provide for the security of the minorr child of the parties by way of conveying a joint interest to the child, along with the wife, and the agreement and settlement are propeerly included in the final decree of divorce. The transcript of the triaal reveals that an active role was taken in these arrangements by Apppellant's own lawyer and Appellant is estopped to deny his approval. Nothing in the record justifies Appellant's present contention ass to the value of one of the parcels of real property, nor the amount of thee encumbrance on the other, and Appellant's effort to introduce, on appeeal, material that was neither alleged nor proven, is prejudicial and improper.

ARGUMENT

I. An Earllier, Unsuccessful Suit Based On One Groundl Of Divorce Is Not A Bar To A Subseqeuent Suit On Different Grounds, Despitee A Concurrence Of Time, Where, As Herre, Plaintiff Proves The Second Claim.

Appellee challeenges Appellant's conception of the issue, which he contends has arisen as the result of Appellee's two suits for divorce against him..

The real questtion is not, as Appellant claims, whether cruelty can be made the basiis of five years voluntary separation. Nor does Appellant's inconsisttent review of the cases, defining the requirements of voluntary separatiion, come to grips with the point he wishes to raise. That point has been disposed of by the record. Appellant, the Appellee, and two witnesses, Sexton and Robinson, testified in open Court that the separation was voluntary. Transcript of Trial, pp. 5, 6, 26, 30, 44, 45, 46, 47, 48, 49, 128, 129, 130, a circumstance conveniently overlooked by Appellant in the preparation of his brief.

The true issue is a narrow one. It is whether Appellee's earlier, unsuccessful suit for a limited divorce on the ground of cruelty is a bar to her subsequent suit for absolute divorce on the ground of five years voluntary separation, where, as here, the suits have a common separation date.

The factual situation that has emerged from the litigation herein sets this case apart, as is usual in domestic relations matters, from the precedents, and enables us to state the issue in even narrower terms. Appellee did not win her earlier suit because the Court found that Appellant did not treat Appellee cruelly. (Final Judgment, dated April 15, 1954, Civil Action No. 251-53). Is Appellee estopped, therefore, by reason of the unsustained allegations of her earlier claim, from stating another and different claim in a subsequent suit?

In the turmoil of emotions that surround the end of a marriage, the parties may view differently the subtle shadings of feelings that range from outrage to resignation,or of actions that range from abandonment to cruelty. A spouse is confronted with the reality of separateness. His or her ideas about how or why it occurred may vary in the course of an hour, a day, or a longer period. From a later and cooler vantage point, either may more readily recognize and accept the fact that the parting was arrived at by mutual accord, though the event or its causes was a cruel thing to be endured.

Accordingly, a claim of cruelty, when unproven, is not inconsistent with a later allegation, which is provable, that the parties separated voluntarily. Nor should the earlier claim operate as an estoppel against the later one when it does mature. The Federal Rules of Civil Procedure allow a party to set forth two or more statements of a claim or defense alternatively or hypothetically and also provide that a party may state as many separate claims or defenses as he has,regardless of consistency. Federal Rules of Civil Procedure, Rule 8 (e) (2), 28 U. S. C. A. This is the spirit

of justice. It has long been the rule in the District of Columbia, and still is, that admissions or recitals of facts made by a party in the pleading in another and different case are not held to be competent evidence. Nor is there any element of estoppel in such pleadings on the trial of another and wholly distinct case. Keyser v. Pickrell, 4 App. D. C. 198, 212 (1894).

In divorce litigation, the District of Columbia authorities appear to be divided as to whether an earlier suit, based upon one of the allowable grounds for divorce, bars a later suit on different grounds, when there is a concurrence of time in the two suits. Analysis reveals the results that have been reached in the cases to be consistent with and supportive of Appellee's position that the earlier suit is not a bar.

In Parks v. Parks, 73 U.S. App. D. C. 93, 116 F. 2d 556 (1940), the Court found no bar. In that case, the wife obtained a limited divorce on the ground of desertion in May, 1935. Three years later, in May, 1938, the husband sued for absolute divorce on the ground of five years voluntary separation. At that time, the parties had been separated for six consecutive years. The Court found that at first the separation was not voluntary, but that later it became so in the statutory sense, because of the wife's acquiescent conduct. The Court held that the wife's limited divorce did not prevent the husband from obtaining an absolute divorce on the ground of voluntary separation. The wife might have enlarged her limited divorce in May, 1937, but she did not, and the Court did not require the husband to wait five years from the date of her decree, or until May, 1940, to file his suit.

In Buford v. Buford, 81 U.S. App. D.C. 169, 156 F. 2d 567 (1946), the wife sued for limited divorce in 1939, immediately following the separation of the parties. She charged cruelty.

Her suit was denied. In 1941, the husband sued for absolute divorce on the ground of desertion. His suit was denied as well. In 1944, the husband sued again on the ground of five years voluntary separation. Following a judgment for the wife, he appealed and was sustained in his contention that it was error to dismiss his complaint. But neither of the earlier, unsuccessful suits was regarded by this Court as a bar to the husband's action.

The Buford decision provides further authority for guidance in the instant case. The trial court had found that the separation was not voluntary. The Court of Appeals found, on the contrary, that the wife had chosen to leave. It said, "If her choice was influenced by unkindness, or even cruelty (of which there is no evidence), on his part, that is immaterial under our statute. To say that there is provocation or justification for an act is not to say that the act is involuntary". [Emphasis supplied]

We have here a close parallel. The parties separated. Appellee charged Appellant with cruelty. She did not prove her case. The parties remained apart for more than five years prior to Appellee's second suit. We need not now examine the secret motivation for this course of conduct, but only the conduct itself to give it legal significance under our statute. For the statute does not require that the separation originate in any particular way, Parks v. Parks, supra.

Appellant has relied heavily on Pratt v. Pratt, 99 U.S. App. D.C. 401, 204 F. 2d 639 (1957), without clearly stating his reasons for such reliance. There are important factual differences between the Pratt case and the instant case. In Pratt v. Pratt, the husband filed for absolute divorce on the ground of five years voluntary separation, less than three months after the wife had obtained a limited divorce on the ground of desertion.

In the Pratt case, a valid decree was in effect, having been granted for a cause of action which matured less than five years prior

to the husband's suit. Hence, it is not an unsuccessful action which bars a subsequent claim, but an existing judgment which binds the parties.

Appellant cites Roberts v. Roberts, 95 U.S. App. D.C. 382, 222 F. 2d 408 (1955), but fails to relate its meaning to the issue he has raised inferentially. In Roberts v. Roberts, the husband filed three separate suits: The first was for a limited divorce on the ground of cruelty and was dismissed; the second and third were for absolute divorce on the ground of five years voluntary separation. In the second suit, the wife testified as to the involuntary nature of the separation. In the third, the husband testified as to the wife's numerous efforts at reconciliation. The trial court found that these efforts were in bad faith. The Court of Appeals held that the evidence gave rise to a presumption of good faith, based in part on the finding in the cruelty suit that the wife was eager and insistent, in good faith, to maintain the marriage. It is the finding of the wife's good faith in the early suit that precluded the husband's later suits, which could only succeed in the absence of such good faith. In its totality, the Roberts case turns on the voluntary nature of the separation. There is no doubt that the conscience of the Court was offended by the husband's cold and persistent campaign to get rid of his wife.

In the case before us, there was no finding that cruelty did exist. Moreover, the question of voluntariness is put to rest by Appellant's own testimony and conduct. See Appellant's long colloquy with the trial judge, Transcript of Trial, pp. 45 to 47.

The Roberts case has given us a definitive test of voluntariness under our statute. There must be affirmative agreement, silent acquiescence, or a showing in good faith of a desire to continue the marriage relation, Roberts v. Roberts, supra, p. 384. Under any aspect of this rule, Appellee must prevail, for the record, as quoted,

supra, shows again and again, that Appellant thought of reconciliation only "within his heart", but meanwhile told friends he was "through".

On the question of the voluntary nature of the separation, the findings of the trial court will not be disturbed unless clearly erroneous. Farish v. Farish, 87 U.S. App. D.C. 329, 185 F. 2d 425 (1950); Talbert v. Talbert, 96 U.S. App. D.C. 55, 223 F. 2d 347 (1955). It is the continuing character of the separation, not its origin or provocation that controls. Bowers v. Bowers, 79 App. D.C. 146, 143 F. 2d 158 (1944); Buford v. Buford, supra. The record clearly shows that Appellant and Appellee have lived their separate lives under the same roof. This will not preclude a legal termination to a marriage that has ceased to exist in fact. Hawkins v. Hawkins, 89 U.S. App. D.C. 147, 191 F. 2d 344 (1951); Boyce v. Boyce, 80 U.S. App. 355, 153 F. 2d 229 (1946).

II. It Is Not An Abuse Of Discretion Or Power For The Court To Incorporate In The Decree Of Divorce An Equitable Property Settlement Agreed Upon By The Parties And Their Counsel.

The award of premises 209 44th Street, N. E., to Appellee and the minor child of the parties herein, as joint tenants, was arrived at by clear agreement, made in the trial judge's chambers and in open Court. Transcript,pp. 131, 146-8. The record clearly shows that Appellant's counsel agreed and reminded the Court of the agreement and suggested a method of conveyance. In her complaint for divorce, dated January 27, 1956, Civil Action No. 804-56, Appellee (Plaintiff below) prayed for support for herself and the said child, court costs and attorney's fees, her share of the jointly owned property and for such other relief as the case might require and the Court might deem proper.

Appellee and Appellant were tenants by the entireties of both premises 209 44th Street, N. E. and 25 45th Street, N. E. The judgment for absolute divorce, filed December 3, 1956, awarded premises 25 45th Street, N. E. to the Appellant as his sole property. In addition, premises 209 44th Street, N. E. was awarded to Appellee and the minor child of the parties as joint tenants and Appellee was restrained by the decree from disposing of her interest in the property for six years without leave of Court. Support for the minor child, payable by Appellant to Appellee, in the amount of $15.00 a month was ordered. No alimony was provided or secured to Appellee.

Appellant has suffered a second thought regarding the above-described disposition of interests and obligations, which disposition he formerly approved and now would lay at the door of the trial court as an abuse of discretion and power. An award of $15.00 a month as support for a child is without reason, except in a context of other agreed-upon adjustments and awards. Appellee asked for alimony, but received none. The record shows that she had materially and even equally contributed to the purchase of both pieces of property owned by the parties. Transcript, pp. 10, 11, 12, 40, 41, 54, 55, 56, 77, 93, 94, 95, 96, 98, 99. It was clearly within the power of the Court, under Title 16, Section 409, District of Columbia Code, to have awarded premises 209 44th Street, N. E. to Appellee as her sole property and Appellant could not now be heard to complain. That Appellee chose to provide for the security of the minor child by the settlement reached by the parties and reflected in the decree, rather than fashioned by it, resulted from a desire to put old contentions and bitterness to rest at last. Such might not be the case were Appellant under order to pay alimony and child support in realistic amounts. Appellant prefers to revive the fight rather than abide by his agreement. There is nothing in the transcript or elsewhere in the record to support the conclusions in Appellant's brief that premises 209 44th Street, N. E. is worth $18,000. The house cost $8,500 and was paid for by 1949.

Transcript, pp. 40, 100. Premises 25 45th Street, N. E. cost $6,500 in 1948 and only $200 was owed on it at the time of trial, Transcript, p. 147, not $1,000, as Appellant would say on this appeal.

That the parties may make valid post nuptial agreements and settlements regarding their jointly held property is unchallenged law in this jurisdiction, whether or not such settlement relates to a divorce action. It follows that such settlements may be incorporated in a decree of divorce. Heath v. Heath, 89 U.S. App. D.C. 68, 189 F. 2d 697 (1951).

CONCLUSION

For the reasons stated herein, we submit that the court below committed no error, and that the rulings complained of by Appellant were proper, and that, accordingly, the decree and judgment appealed from should be affirmed.

Respectfully submitted,

BELFORD V. LAWSON, JR.

MARJORIE A. McKENZIE

2001 11th Street, N. W.
Washington, D. C.

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SUPPLEMENTAL APPENDIX

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IDA CHINN, :
Plaintiff, :
v. : Civil Action No. 804-56
JOSEPH S. CHINN, :
Defendant

Washington, D. C.
October 16, 1956

The above-entitled action came on for trial before The Honorable Edward M. Curran, United States District Judge, at 10:45 o'clock a. m.

APPEARANCES:

On behalf of the Plaintiff: BELFORD V. LAWSON

On behalf of the Defendant: JO V. MORGAN, JR.

* * * * *

3 IDA CHINN,

the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAWSON:

* * * * *

5 THE COURT: When was this you agreed to separate?

THE WITNESS: In January, 1951.

BY MR. LAWSON:

Q. Would you tell the Court everything about that conversation, just what happened. A. We decided that we just could not get along and

6 I couldn't live with him, the way he treated me, and he would go his way and I would go my way.

Q. Did you give him any cause for him to agree to that? A. No, I never.

Q. Since that date have you and he spoken to each other? A. No, I do not speak to Mr. Chinn.

Q. Do you cook for him? A. I don't cook for him.

Q. Do you launder for him? A. No.

Q. Do you sleep in the same room with him? A. No. We have separate bedrooms and separate kitchens.

Q. Has he threatened to kill you since then? A. Any number of times.

MR. MORGAN: I object to the leading questions.

THE COURT: Oh, it is all right. Go ahead.

MR. MORGAN: What did she say?

THE COURT: She said he threatened to kill her.

THE WITNESS: I have had him in court here and the Judge told him not to come here any more.

* * * * *

BY MR. LAWSON:

Q. You and your husband own two pieces of property jointly?

A. Yes, the piece at 209 is paid for. The piece on 45th Street is not paid for. He is collecting the rent and taking the rent.

In February after I found out the note was behind on the property two months I was forced to go in and pay it up to keep from losing the property, and after I started then he started giving me the rent money.

THE COURT: 25 45th Street is owned by you jointly?

THE WITNESS: Yes.

THE COURT: As tenants by the entirety?

THE WITNESS: Yes.

THE COURT: And that is paid for?

THE WITNESS: No, that is not paid for. There is a balance of one hundred and some dollars due on that.

THE COURT: A balance of $100?

THE WITNESS: $100 and some odd, I don't know exactly the amount.

THE COURT: And the piece at 209 44th --

THE WITNESS: Is paid for.

THE COURT: And you own that as tenants by the entirety, too?

THE WITNESS: Yes.

* * * * * *

26 BY THE COURT:

Q. Since the date of separation in 1951, on which you say you and your husband have agreed to separate and that you haven't lived with him as man and wife since that time, my question is: Since January 1951, has he suggested that you live together as man and wife? A. No.

* * * * *

OTIS SEXTON

was called as a witness by the plaintiff, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAWSON:

* * * * *

29 Q. Well, what have you seen with respect to their eating? A. I have seen Mrs. Chinn and Carol, that's my grandchild, I have seen them eating, and I have seen his kitchen down in the basement with his stove and Frigidaire and everything down there.

Q. Have you seen Mr. and Mrs. Chinn eat together? A. No.

Q. Have you ever heard them speak to each other? A. No.

* * * * *

30 THE WITNESS: Well, in other words, he didn't care to live with Mrs. Chinn.

THE COURT: He told you he didn't care to live with her.

THE WITNESS: He didn't care to live with her, and I asked him why they didn't sit down and talk things over and try to reconcile things, but he didn't want to do that.

BY MR. LAWSON:

Q. Do you know whether or not they have separate bedrooms? A. Yes, I know that.

Q. You have seen the two separate bedrooms? A. I have seen the two separate bedrooms.

Q. Have you ever seen Mrs. Chinn doing any laundry work for him? A. No.

* * * * *

38 JOSEPH CHINN,

the defendant, being first duly sworn, was examined and testified as

39 follows:

DIRECT EXAMINATION

BY MR. MORGAN:

* * * * *

40 Q. And who put up the money for the down payment? A. I put up the first of it and not quite enough to make the down payment.

Q. How much was the down payment? A. $500, and I put up I don't know how much now, but Ida Chinn gave me $250. That's what she gave me on the house. * * *

* * * * *

Q. How much did the house cost? A. $8,500.

* * * * *

41 Q. What about the other house? Is that paid for? A. It is not.

* * * * *

THE COURT: How much did that house cost?

THE WITNESS: $6,500.

THE COURT: How much was the down payment?

THE WITNESS: $2,000.

* * * * *

44 BY MR. MORGAN

Q. Have you urged her to resume her marital relations with you since that time? A. No, I have not, but I wish to God with all my heart she would have.

* * * * *

45 Q. During that time would it have been possible for you to have talked to her concerning her coming aback to live with you? A. I wanted to but I couldn't get anywhere. I wanted to.

Q. What was her attitude?

BY THE COURT:

Q. Did you ever suggest it to her? A. I could not. No, I did not. After '52 I thought it was not worth while.

* * * * *

46 Q. And then after that what makes you think you couldn't go back to her? A. Because she didn't show any indication that she wanted me at all. I would come up and sit in the dining room and --

Q. Why were you living in the basement anyway? A. I didn't live down there; I just cooked down there.

Q. Didn't you have your meals with your wife? A. No.

Q. Why? A. I don't know -- she wouldn't cook for me.

Q. When did she stop cooking for you? A. It was somewhere back in about 1952, something like that, because I moved the stove downstairs then.

Q. Why wouldn't she cook for you? A. I couldn't tell you.

Q. Did you ask her? A. I did not.

Q. Why didn't you? A. I should have, I wanted her to, but

47 I didn't, but I'll tell you what I did do, lots of times I would come in the house and I would be hungry and I didn't feel like cooking and I would go up in the ice box and take out what I wanted and eat it.

Q. Why didn't you ask her why she didn't cook for you?

A. Because the wife would cuss me out.

Q. You never did ask her? A. No. * * *

* * * * *

Q. Did you ever mention her living with you? A. No, I never did; I was just praying to God and thinking she would come back some time.

Q. But you never asked her? A. I never asked her, but we were there together and I was thinking she would.

* * * * *

48 Q. When did you move into your separate bedroom? A. Oh, we have been in that for years, even when we had the store, a long time ago; it would have been about 1948 we had separate bedrooms.

* * * * *

49 Q. You don't know why she stopped living with you as man and wife? A. I don't know to save my life.

Q. And you never asked her? A. I have never asked her but I was praying in my heart that she would come back.

* * * * *

52 CROSS EXAMINATION

BY MR. LAWSON:

* * * * *

54 Q. At that time you and Mrs. Chinn had a store? A. Yes.

Q. And she worked there? A. Yes.

Q. And you at that time had no other income except the Government check? A. That's right.

Q. And she worked there four or five years? A. She worked not quite five years. She left June 20th 1949.

55 BY THE COURT:

Q. Did she get paid for it? A. We both divided.

Q. You divided the money up? A. I gave the money to Ida every Sunday night and she checked it and gave me so much to carry back to the store on the following Monday.

BY MR. LAWSON:

Q. That is the money you both took to pay for this house? A. No.

Q. Some of it? A. Yes.

Q. How much of it? A. I can't think -- it was $2,000 and I gave eleven checks.

Q. So she gave $900. A. She did not.

Q. You paid $1,100 and she paid $900 on the down payment; that's correct. A. No, our money was together and not separate. Ida and I both were in the store.

Q. You paid $2,000? A. Yes.

Q. And you had $1,100? A. Yes.

56 Q. Where did the other $900 come from? A. We took it out of the store.

Q. And both of you were making that money? A. Both of us was making that money.

* * * * *

76 JOSEPH A. FRANCELLA

was called as a witness by the defendant and being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MORGAN:

* * * * *

77 Q. First, with respect to Lot 88, in Square 5138, which is 25 45th Street, Northeast, did you find the settlement sheet in there; the one to the seller which would normally have the names of the seller at the top -- not the seller, I mean the purchaser -- what name does appear at the top? A. Joseph S. Chinn and Ida V. Chinn.

Q. What is the date? A. March 26, 1948.

Q. And what was the purchase price? A. $6,500.

* * * * *

85 JOSEPH S. CHINN,

having been previously sworn, resumed the stand and testified further as follows:

* * * * *

REDIRECT EXAMINATION

BY MR. MORGAN:

* * * * *

93 Q. We want to find out how that was paid and whose money it was and whether you have money receipts or have any check stubs.

A. We paid it out of the grocery store.

Q. And that is money that you earned in the grocery store and you would take it out of the till and pay it on the house? A. Yes.

94 Q. Would it go through a bank account? A. We didn't put it in the bank. We went to the American Building Association and paid the cash.

Q. So that was coming out of the business? A. Out of the grocery store.

Q. And your grocery store business lasted long enough to pay that off? A. It lasted long enough to pay off the note on the house. It enabled me to buy a new car. I bought it in College Park, and it also gave us -- gave me money enough to purchase this other piece of property, other than my check, * * *

* * * * *

95 RECROSS EXAMINATION

BY MR. LAWSON:

* * * * *

Q. Whose name was it [the store] in? A. The license was in Mrs. Chinn's name.

Q. Why? A. Because I came out of the Navy Yard on disability.

96 Q. What does that have to do with it? A. I did not want the license in my name because I wasn't able to go to work.

* * * * *

98 Q. The only reason you had the license put in her name was because you loved her. A. I did.

Q. And that's the only reason. A. I did. I wanted her help; I wanted her cooperation.

Q. Is that the only reason? A. That's the only reason. I wanted her help and cooperation.

* * * * *

99 Q. How were you able to save your pension for a year?

A. Because the store was paying good.

Q. And what happened to the other $20 from the rent? A. Taxes and water rent and upkeep.

Q. How much money did you take out of your income, which income you didn't have, to finish paying these notes when the house was vacant? A. I had an income ever since I come out of the army.

Q. But you were saving it for eleven months. A. We had the store.

Q. During that time when you were saving your $100 a month, the money came from the store and the store was in your wife's name and she worked there all the time that you had the store. A. Not all the time, but very near all the time.

Q. How long did she work? A. She was with me from the time I got the store until June 20, 1949.

Q. You had the store roughly five years? A. Yes.

Q. And she was there roughly four and a half years? A. Yes.

Q. And then she went back to Howard University? A. Yes.

Q. And when she went back to the University the whole place was paid for? A. Yes.

100 Q. Out of the store? A. Yes.

* * * * *

122 OTIS SEXTON

having been previously sworn, was called by the plaintiff as a witness in rebuttal, and testified as follows:

* * * * *

126 CROSS EXAMINATION

BY MR. MORGAN:

Q. Mr. Sexton, when you went out to see if you could settle things between Mrs. Chinn and Mr. Chinn -- A. I didn't go out to see if I could settle things. He was talking to me about them, about him and Mrs. Chinn, so I tried to say why don't you get together. It wasn't a case of me going out to try to settle.

Q. Did he appear to want to get together? A. No.

Q. Did you know whether she wanted to get together with him? A. She had talked about it, tried to straighten it out, but he didn't want no parts of it.

Q. You are sure you didn't go out there at her suggestion? A. No, no. That was his trouble, he always was afraid -- any time anyone said anything or tried to help Mrs. Chinn or do anything they became his enemy, and being the grandfather of the child naturally I took an interest in it, and of course it got to the point where the grandchild wouldn't speak to me as long as she was with him because he told her he didn't want her speaking to me; and Mrs. Chinn had to threaten to whip her in order to make her speak to me as a grandfather.

Q. You did testify before that Carol and the father seemed to
127 get along very well.

Q. Did Carol Chinn and her mother get along very well? A. Always did, because she was the sole support of the child.

Q. You are certain he told you, when you went out there, that he hadn't had any intercourse with his wife in a year? A. I am positive of that.

Q. Do you normally discuss such things with him? A. Well, this particular time he did. We used to talk as friends up until the time I spoke in favor of Mrs. Chinn, and then I was his enemy.

* * * * *

CHARLES ROBINSON

was called by the plaintiff, as a witness in rebuttal, and having been previously sworn testified as follows:

DIRECT EXAMINATION

BY MR. LAWSON:

Q. Mr. Robinson, did you testify this morning that you had a conversation with Mr. Chinn about his marital difficulties? Is that correct? A. Yes, I did.

Q. How many times have you discussed their difficulties with
128 him? A. I will say twice.

Q. And when were these times? A. That was the first time when he came to my house and asked me to come and talk to him.

Q. When was the second time? A. I think in 1951, around in there.

Q. When was the last time? A. The last time I discussed it with him it was, oh, I think it must have been in 1955.

Q. Tell the Court about those two conversation. A. Well, the conversation was that I was trying to get him to settle the differences in a peaceable way so that nobody would be involved in serious trouble. That was the time I told you that while I was talking to him and he was telling me he was through, and the thing was over, that was the time when I told you I saw this gun and I got out as quick as I could.

* * * * * * *

BY THE COURT:

129 Q. What do you mean he said he was through? A. Well, I don't know what he meant, but that's what he said.

Q. He was through? A. He was through, and I talked with him to try to get him and show him there was a reasonable way to get satisfaction without going to violence or anything of that sort.

BY MR. LAWSON:

Q. Did he say anything to you about whether or not they had reached any sort of settlement or understanding? A. No, As far as that is concerned he said he was through.

Q. When you talked with him the second time what did he say? A. The second time I talked with him it was practically on the same line that there wasn't no settlement at all between them, they just couldn't make it.

Q. Did he say whether or not they had agreed to disagree, or

130 words to that effect? A. I wouldn't put it that mild, but it was a matter that he was through, whether it was an agreement or not on that he was through.

* * * * *

131 THE COURT: I will see counsel in chambers.

Thereupon, at 3:30 o'clock p. m. the trial was recessed until October 17, 1956, at 10 o'clock a. m.

* * * * *

146 THE COURT: I find for the plaintiff. The big house goes to the wife and the other house to the husband, and she will have custody
147 of the child with right of visitation by the father; and $15 maintenance per month.

MR. MORGAN: You didn't mention the fact that the big house is going jointly to the child and mother.

THE COURT: Yes.

MR. LAWSON: I may say to Your Honor she was very glad to take Your Honor's suggestion, which shows the type person the plaintiff is.

MR. MORGAN: Could I make one suggestion in that regard?

My client is somewhat short of funds at the moment, and also he has got the mortgage of about $200 to pay off on the small house. It isn't clear; that has to come out of what he gets. Could the $15 payments start January 1, 1957?

MR. LAWSON: In the first place he gets $162 and in the second place it is such a small amount I should think he would be willing to do that for his daughter.

THE COURT: I think January first is reasonable in view of the fact there is about a $200 mortgage.

MR. MORGAN: If Your Honor please, I think the order should provide, because the child is not strictly a party to the proceeding, that Mr. and Mrs. Chinn will deed to a straw party the big house and back to the daughter.

THE COURT: I am not going into details.

148 MR. MORGAN: We will work that out because otherwise you can't create a joint tenancy.

THE COURT: All right.

(Thereupon the trial was concluded.)

* * * * *

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FILED
APR 15 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 926

JOSEPH S. CHINN

Petitioner

v.

IDA V. CHINN

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

EUGENE N. MURPHY
211 C Street, N. W.
Washington, D. C.
Counsel for Petitioner

REX K. NELSON
Of Counsel

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In The

Supreme Court of the United States

October Term, 1957

No.

Joseph S. Chinn

Petitioner

v.

Ida V. Chinn

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on January 16, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (R. 27, infra, 3a). The District Court entered an order granting judgment for absolute divorce, awarding support for a minor child and adjudicating property rights (R. 9, infra, 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Husband and wife are owners of two pieces of property as tenants by the entirety. In granting the wife a divorce, the District Court awarded the more valuable property to the wife and minor child of the parties as joint tenants. The other property, of lesser value, was awarded to the husband in fee simple, and he was ordered to make monthly payments for support of the minor child placed in the wife's custody.

The authority and jurisdiction of the District Court when it had divorce jurisdiction,[1] was limited by statute to support of minor children during their minority. It did not extend to endowment in lieu of or to supplement support. In the absence of any written property agreement between the parties which complied with the Statute of Frauds,[2] and in the absence of any evidence in the record showing mutual assent of the parties to the order of the court, the question presented is:

1. Whether a person is deprived of his property without due process of law by the District Court endowing a minor child with his property in a divorce proceeding, without his assent or written agreement, and which endowment exceeds the statutory authority of the court.

STATUTES INVOLVED

Title 16-409 D.C. Code (1951):

> Upon the entry of a final decree of annulment or divorce a vinculo, in the absence of a valid antenuptial or post nuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and the

[1] Jurisdiction transferred to the Municipal Court for the District of Columbia, Title 11-758 D.C.Code (1951), 70 Stat. 111, ch. 204, § 101.

[2] Title 12-302, D.C.Code (1951).

court, in the same proceeding in which such decree is entered, shall have power and jurisdiction to award such property to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just, and reasonable. (Mar. 3, 1901, ch. 854, § 974a, as added Aug. 7, 1935, 49 Stat. 540, ch. 453, § 3.)

Title 16-411 D.C.Code (1951):

When a divorce is granted to the wife, the court shall have authority to decree her permanent alimony sufficient for her support and that of any minor children whom the court may assign to her care, and to secure and enforce the payment of said alimony in the manner before mentioned, and may, if it shall seem fit, retain to the wife her right of dower in the husband's estate. (Mar. 3, 1901, 31 Stat. 1346, ch. 854, § 976.)

STATEMENT

The respondent wife filed suit in the United States District Court for the District of Columbia asking for an absolute divorce, custody of a minor child, support money for herself and child, and her share of real property owned as tenants by the entirety with the petitioner husband (R. 5-6). The respondent alleged in her sworn complaint that one property, 25-45th Street, N.E., had an approximate market value of $6,500, and another property at 209-44th Street, N. E., had an approximate market value of $15,000 (R. 6). Petitioner did not dispute the values alleged, and, so far as the record on appeal indicates, constituted the guide utilized by the trial judge in valuation and awarding of the property.

The District Court (R. 9) awarded the 44th Street property, valued by respondent at $15,000, to the respondent and the minor child of the parties as joint tenants, and the 45th Street property, valued at $6,500 by respondent, to petitioner in fee simple, and directed petitioner to pay $15.00 monthly for support of the child with custody in respondent.

No written ante or post nuptial agreement of any nature was entered into by petitioner and respondent. On appeal petitioner claimed error in awarding real property to the minor child. The respondent argued by brief (p. 8) that the parties agreed to the disposition of the property as made by the court; that the agreement was made in chambers and open court as evidenced by the following (R. 26):

> THE COURT: I will see counsel in chambers.
> Thereupon, at 3:30 o'clock p.m. the trial was recessed until October 17, 1956, at 10 o'clock a.m.
> THE COURT: I find for the plaintiff. The big house goes to the wife and the other house to the husband, and she will have custody of the child with right of visitation by the father; and $15 maintenance per month.
> MR. MORGAN: You didn't mention the fact that the big house is going jointly to the child and mother.
> THE COURT: Yes.
>
> • • • •
>
> MR. MORGAN: If your Honor please, I think the order should provide, because the child is not strictly a party to the proceeding, that Mr. and Mrs. Chinn will deed to a straw party the big house and back to the daughter.
> THE COURT: I am not going into details.
> MR. MORGAN: We will work that out because otherwise you can't create a joint tenancy.
> THE COURT: All right.
> (Thereupon the trial was concluded.)

The resistance to or lack of agreement by petitioner is indicated in the testimony of a witness for respondent (R. 25):

> Q. Did he say anything to you about whether or not they had reached any sort of settlement or understanding?
> A. No, as far as that is concerned he said he was through.
> Q. When you talked with him the second time what did he say?

A. The second time I talked with him it was practically on the same line that there wasn't no settlement at all between them, they just couldn't make it.

The award was affirmed by the court of appeals on the premise that a property agreement approved by the parties and their counsel had been incorporated by the District court into the final judgment (R. 27, infra, 2a).

REASONS FOR GRANTING THE WRIT

There is no question of the inherent and statutory power of the courts to make orders for the support of children during minority.[3] Statutory authority to award community property incidental to divorce is quite another matter. The United States Court of Appeals for the District of Columbia, *Wheeler* v. *Wheeler, 88 U.S.App.D.C. 193, 188 F.2d 31,* considered property rights as between husband and wife saying:

> Turning from the statutory language to general principles of equity jurisprudence, we find that the question of the court's power over the husband's real property often has arisen in other jurisdictions. And the courts have generally agreed that, absent more explicit statutory authorization, a statute empowering the court to grant alimony does not give the court power to award the husband's property to the wife in lieu of, or in addition to, the sum of money allowed for her support; such action has been considered to be beyond the court's jurisdiction. See cases collected in 133 A.L.R. 860, et seq. (1941); 2 Nelson, Divorce and Annulment § 14.104 (2d ed. 1945). This is so even where the court's powers to grant alimony in connection with an absolute divorce are not exclusively statutory but are also derived from the court's general equity jurisdiction.

In a subsequent opinion the court of appeals held the

[3] Emrich v. McNeil, 75 App.D.C. 307, 126 F.2d 841, 146 ALR 1146.

right to support is not the right to endowment.[4] These opinions are in harmony with state decisions where, obviously, the majority of such determinations are found because of divorce jurisdiction.

Emery v. *Emery, 104 Kan. 679, 180 P. 543,* appears widely cited on the question of awarding property to minor children as an incidence of divorce. The court held an award of property to the minor children was void, stating.

> The power even of a court of general jurisdiction does not extend to taking property from a party to an action and giving it to a stranger. Whatever power the district court has in a divorce suit to afford protection to the children of the parties is derived from the statute quoted, and is limited to making provision for their support and education *during their minority.*

The rule is followed in other jurisdictions, among others, Iowa and Ohio.[5] The opinion of the appellate court in this case and prior decisions as hereinbefore cited, indicate harmony in opinion of the law with that expressed in the states, but the appellate court below would allow the award to the child to stand in this instance as an exception to the rule, viz., incorporation of a property agreement between the parties and their counsel in the decree of the court.

The controlling statute, Title 16-409 D.C. Code, supra, requires a VALID ANTENUPTIAL OR POSTNUPTIAL AGREEMENT, otherwise the court is restricted in power and authority to division of the realty between the legal and equitable owners. It seems unnecessary to state that a valid husband and wife real property agreement must have all the attributes of any contract, i.e., consideration,

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[4] Keleher v. Keleher, 89 U.S.App.D.C. 266, 192 F.2d 601.

[5] Thiessen v. Moore, 137 N.E. 906, 105 Ohio 401; Davidson v. Davidson, 165 N.W. 44.

absence of fraud or coercion, in writing and signed as required by the statute of frauds. No written separation or property agreement was entered into by petitioner and respondent. The quoted portions of the trial testimony (R. 25, supra, p. 4, 5) clearly demonstrate resistance of petitioner to agreement or settlement. That portion of the trial proceedings (R. 26, supra, 4) relied upon by respondent and the court below to show existence of a property agreement between the parties is *entirely devoid of anything upon which to predicate such a finding.* At most the record shows:

1. Opposing counsel had a discussion of some nature in chambers.
2. Counsel appeared aware of the trial court's intentions with respect to disposition of the joint property before announcement in open court.

The record fails to show that petitioner acquiesced in such a property distribution prior to or after pronouncement by the court. Consistent with the absence of such a showing is the complete absence of any indication by the trial court in its oral announcement that his decision was in any way predicated upon agreement or assent of either party. Neither does the judgment for absolute divorce (R. 9, infra, 1a) contain any indication whatever that the property award was predicated upon agreement or assent of the parties, or that any agreement of the parties was incorporated therein. To the contrary, the divorce decree speaks solely for and in behalf of the court. Petitioner's disagreement with the court's judgment was quickly manifest by an appeal claiming error in awarding of the property.

Title 16-409, D.C.Code, supra, requires apportionment of husband and wife joint tenancies in such manner as shall be equitable, just and reasonable. The court clearly abused the statute by awarding petitioner the property valued at $6,500 and otherwise disposing of the property

valued at $15,000. In any event, the arbitrary and extra legal assumption of power and authority by the district court in awarding petitioner's property to the minor child as an endowment without valid agreement thereto constitutes a taking of property without due process and in derogation of the laws of descent.

Since the appendices herein (R. 1-26) constitute the only record upon which the appellate court had to predicate its opinion that the trial court had incorporated a mutual agreement into the judgment, and there is no evidence in the appendices showing such an agreement, petitioner respectfully states the judgment herein represents a radical departure from judicial processes, in conflict with state decisions, and a denial of due process sufficiently serious to warrant the attention of this Honorable Court.

CONCLUSION

For the reasons stated, your petitioner believes his petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE X. MURPHY
211 C Street, N. W.
Washington, D. C.
Attorney for Petitioner

REX K. NELSON
211 C Street, N.W.
Washington, D.C.
Of Counsel

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 804-56

IDA CHINN
209 44th Street N.E.
Washington, D.C.
Plaintiff

vs

JOSEPH S. CHINN
209 44th Street N.E.
Washington, D.C.
Defendant

Filed December 3, 1956

JUDGMENT FOR ABSOLUTE DIVORCE

This cause coming on to be heard, upon the complaint and answer, the testimony taken in open Court, argument of counsel, and it appearing to the Court from consideration thereof that the plaintiff is a citizen of the United States and has been a resident of the District of Columbia for more than two years next preceding the filing of this action; that the plaintiff and defendant were married on August 30, 1940, in Upper Marlboro, Maryland; that the parties have one child, who is in the joint custody of the plaintiff and defendant; that the plaintiff and defendant voluntarily separated on January 15, 1951; said separation has been continuous without cohabitation to this date, it is by the Court this 3rd day of December, 1956

ORDERED ADJUDGED AND DECREED, that the plaintiff be and she is hereby granted an absolute divorce from the defendant on the ground of five years voluntary separation, continuously, and uninterrupted without

cohabitation to the present date; provided that this judgment shall not become effective until the expiration of the time allowed for taking an appeal, nor until a final disposition of any such appeal, nor in any event until the expiration of six months from the date hereof.

It is further ORDERED, ADJUDGED AND DECREED, that the custody of the minor child of the parties hereto be awarded to the plaintiff and that the defendant pay to the plaintiff the sum of $15.00 a month for support of said child; said payments to be made on the first of each month beginning January 1, 1957; that the defendant is hereby given the right of visitation at reasonable times.

It is further ORDERED ADJUDGED AND DECREED, that the property owned by the parties hereto, as tenants by the entireties, located at 209 44th Street, Northeast is hereby awarded and conveyed to the plaintiff and Carol Chinn, the minor child of the parties hereto as joint tenants and that the property owned by the parties as tenants by the entireties, located at 25 45th Street, Northeast, be and is hereby awarded and conveyed to the defendant in fee simple. Plaintiff may not convey her interest in said property for six years without leave of Court.

/s/ Edward M. Curran
Judge

Seen

/s/ Jo V. Morgan, Jr.
Attorney for Defendant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,881

JOSEPH S. CHINN, APPELLANT

v.

IDA V. CHINN, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided January 16, 1958

Mr. Everett L. Edmond for appellant.

Mr. Belford V. Lawson, Jr., with whom *Miss Marjorie A. McKenzie* was on the brief, for appellee.

Before PRETTYMAN, WILBUR K. MILLER and BASTIAN, Circuit Judges.

PER CURIAM: Appellant seeks to reverse a judgment for absolute divorce granted on the ground of voluntary separation without cohabitation for a period of five years. We find no error.

Appellant also complains that the District Court erroneously disposed of real estate jointly owned by the parties. The court incorporated into the final judgment a property agreement approved by the parties and their counsel. This the court had the right to do.

Affirmed.

Filed Jan. 16, 1958. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,881

January Term, 1958.

C. A. 251-53

JOSEPH S. CHINN, APPELLANT

v.

IDA V. CHINN, APPELLEE

Appeal from the United States District Court for the District of Columbia.

Before: PRETTYMAN, WILBUR K. MILLER and BASTIAN, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant her taxable costs on this appeal and have execution therefor.

Dated: January 16, 1958.

Per Curiam.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 926

JOSEPH S. CHINN
Petitioner

v.

IDA V. CHINN
Respondent

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BELFORD V. LAWSON, JR.
MARJORIE A. McKENZIE
Attorneys for Respondent
2001 11th Street, N. W.
Washington 1, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 926

JOSEPH S. CHINN,
Petitioner

v.

IDA V. CHINN
Respondent

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent opposes the granting of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered herein on January 16, 1958, for the reason that there is no error, and further because no question of general importance is involved and no question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States has been raised.

QUESTIONS PRESENTED

1. Whether the United States District Court for the District of Columbia has the right to incorporate into its final judgment a property agreement approved by the parties and their counsel at the end of a divorce trial.

2. Whether the District Court under its statutory power in a divorce proceeding to award property to the party entitled thereto, may with the consent of the party so entitled, include a minor child of the parties in the award.

STATUTE INVOLVED

Title 16-409 D.C. Code (1951 Ed):

Upon the entry of a final decree of annulment or divorce a vinculo, in the absence of a valid antenuptial or postnuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and the court, in the same proceeding in which such decree is entered, shall have power and jurisdiction to award such property to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just, and reasonable. (Mar. 3, 1901, ch. 854, 974a, as added Aug. 7, 1935, 49 Stat. 540, ch. 453, 3.)

STATEMENT

Respondent, Plaintiff below, filed suit in the United States District Court for the District of Columbia, for an absolute divorce on the grounds of five years voluntary separation, and asked for custody of the minor child of the parties, support for the child and herself, her share of the two parcels of real property owned by her and Petitioner as tenants by the entirety, and court costs and attorney fees. There was lengthy testimony at the trial that one of the parcels, 209 44th Street, N. E., cost $8,500.00 and the other, 25 45th Street, N. E., cost $6,500.00. There was further proof that Respondent had contributed equally with Petitioner to the payment of the purchase price of both parcels.

When all of the testimony was in, the trial was recessed until the following morning. In the interim, the

trial judge saw opposing counsel in chambers. When the trial resumed, he announced that he found for Respondent and granted her the divorce, custody of the child, and $15.00 monthly for support of the child. He awarded to each of the parties one of the parcels.

Petitioner was present throughout the trial and consulted frequently with his lawyer. Petitioner's own lawyer reminded the trial judge that the parties and their counsel had agreed, at the trial's end, to the inclusion of the minor child in the award of 209 44th Street, N. E. to Respondent. (R. Appendix, p. 12).

The United States Court of Appeals for the District of Columbia approved the award as proper in these circumstances.

REASONS FOR DENYING THE WRIT

At each step of Petitioner's continuing effort to avoid removal from the premises where he is free to pursue his harassment and persecution of his former wife, Petitioner has raised new questions.

Conceding now the validity of the Judgment for Absolute Divorce filed on December 3, 1956, Petitioner confines himself to a complaint concerning the trial court's award of one of the two parcels of real property jointly owned by the parties to Respondent and the minor child of the parties. But Petitioner refers to the award as if made to the child alone. At no point in his argument as to the reasons why the writ should be granted, nor in the legal question he presents to this Court, does Petitioner refer to the fact that the property was awarded to the *wife* and the minor child.

The proper legal question, therefore, is whether the award of the property, located at 209 44th Street, N. E., to the Respondent and the minor child is improper, as beyond the power of the Court, when it is conceded that

the Court had statutory authority to make such an award to the wife alone.

There are two reasons why the award of the trial court should stand.

The first is that Petitioner consented to the award at the time it was made. He was present in Court throughout the trial. He had the advice and counsel of a lawyer of his own choosing. His lawyer took an active part in working out the details of the decree (Petition, p. 4) and consulted with Petitioner about the terms at every step of the proceedings. The record shows that Petitioner has been represented by four different lawyers in this case. The agreement which has been relied upon by Respondent and approved by the Court of Appeals refers to the agreement reached by the parties and counsel at the end of the trial and incorporated in the judgment. The judgment bears the signature of Petitioner's counsel. Such agreement does not have to be in writing and no claim has been made by Respondent that there existed an antenuptial or postnuptial agreement prior to the trial. Petitioner's reference to a lack of agreement (Petition p. 4) and his excerpt of testimony (R. 25) are completely out of context in this respect. The testimony quoted by Petitioner refers to the settlement of the marital difficulties, and the purpose of its introduction at the trial was to show whether or not there had been a voluntary separation between the parties for five years.

The second reason why the award of the trial court should stand is that there is ample evidence to sustain a finding that Respondent was entitled to the property under Title 16-409 D.C. Code (1951 Ed.) (Petition, p. 2). Respondent worked in a business, owned in her name with Petitioner for years and both parcels of real property owned by them were paid for out of the proceeds of this business. (R. Appendix, pp. 6, 7, 8, 9). The trial court has, under Title 16-409, the right to exercise

a sound judicial discretion in adjusting the property rights of the parties. (*Slaughter* v. *Slaughter*—171 F. 2d 129, 83 U.S. Appeals, D. C. 301, 1948).

The person whose right and title have been diminished by the award is Respondent, not Petitioner. Her consent to the inclusion of the child in the conveyance is sufficient to authorize it. The Court found for Respondent (Plaintiff below) and awarded her the property in question. *Petitioner's own counsel reminded the trial judge that it had been agreed that the child was to be included.* (Petition, p. 4; Appendix, p. 12).

Petitioner now objects to his own contribution to the fashioning of the decree. Judicial proceedings would mean very little in the determination of controversies if the parties thereto could be permitted to upset judgments with every second thought.

CONCLUSION

For the reasons stated, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Belford V. Lawson, Jr.
Marjorie A. McKenzie
2001 11th Street, N. W.
Washington 1, D. C.